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THE DOCUMENT COMPANY
XEROX

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Region IX
75 Hawthorne Street, ORC-3
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Re: Omega Chemical Site – De Minimis Settlement Offer

Dear Ms. Cox:

I am Xerox Corporation's Environment, Health and Safety attorney and I am writing on behalf of Xerox in response to EPA's proposed de minimis settlement offer dated February 6, 2004 and the associated remediation cost estimates that EPA later circulated in April 2004 in support of that offer. I am aware that at least one de minimis PRP group has formed and has commented on EPA's approach. To the extent EPA has made any modifications to its approach or has engaged in negotiations where the terms of EPA's offer have been modified for any de minimis PRPs, I hereby request information regarding the terms of such proposals or compromises.

Xerox's primary concerns with the de minimis offer are:

1 – The excessive costs estimate for remediation at the site, driven in part by the failure to separate responsibility for OU-1 projected costs from OU-2 costs;

2 – The lack of relationship between Xerox's waste and the contaminants at the site;

3 - The 100% multiplier for the de minimis settlement; and

4 - The "free pass" given to other generators at the expense of the de minimis parties.

Xerox is willing to consider contributing a reasonable amount toward settlement of this matter. If EPA is willing to modify its offer or discuss a compromise, Xerox is willing to consider settling EPA's possible claims.

1 – Excessive Remediation Cost Estimate and Failure to Distinguish Between OU-1 and OU-2 Costs. The materials forwarded by EPA include various materials generated by SAIC and CH2MHill. While EPA asserts that these estimates form a reasonable basis for the initial $89.2 million remediation cost estimate used for generating the de minimis numbers, the estimates have serious shortcomings which are acknowledged by SAIC and CH2M. Most revealing is the statement on page 6 of CH2M's April 6th "Conceptual Cost Estimate for Sitewide Remedial Action,"

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which states: "Thus, actual remediation costs for the Omega site will be different than the estimates presented herein, possibly by more than an order of magnitude." This statement, which is repeated several times, suggests that actual costs could be far less than those projected.

This overestimate is compounded by EPA's assumption that full responsibility for site-wide remediation will fall on the Omega site PRPs for the remediation of both OU-1 and OU-2, even though the vast majority of the costs are associated with OU-2. SAIC acknowledges in its December 19, 2003 letter regarding PRP search costs that there are likely numerous PRPs, apart from the current Omega PRPs, that may have responsibility for OU-2 remedial costs. Although the numbers have been redacted, EPA obviously expects that it will be sending general notice letters to numerous OU-2 PRPs outside of the Omega PRPs, and EPA undoubtedly will seek substantial contribution from such parties for the same remedial costs that are being sought by EPA from Omega de minimis PRPs. By assuming that only Omega PRP waste-in volumes are relevant for OU-1 and OU-2 remediation, EPA has significantly overstated what will ultimately be the fair percentage contribution required from Omega de minimis PRPs. EPA's de minimis policies require EPA to account for all PRPs' waste contributions to the extent practicable. At a minimum, EPA should consider OU-2 PRPs' waste-in when calculating any de minimis payment for the OU-2 portion of remediation costs.

Xerox acknowledges that EPA faces a difficult task balancing the need for making early settlement offers with the need to be conservative when information gaps exist. However, issuing a "take it or leave it" de minimis offer when remediation costs are so ill-defined leads to ultra-conservative EPA assumptions and a passing of liability on to de minimis parties. This error is also compounded by the use of a 100% multiplier and EPA's decisions to allow any party with less than 3.0 tons of waste to entirely escape liability. Xerox objects to any characterization that it or any other party would be considered "recalcitrant" merely because it does not participate in a settlement under the terms proposed.

2 – Nature of the waste. Xerox is alleged to have sent approximately 6 tons of waste to the site, including isopropanol flammable liquid, waste oils, waste toner and waxes, some F003 waste liquid, and trichlorofluoromethane. However, the cleanup estimates and related materials highlight the fact that clean up is being driven by the presence of TCE, PCE and freon. There is simply no connection whatsoever between the contamination, the clean up costs, and Xerox materials allegedly shipped to the site. In any fair allocation, this factor would be a key component to a liability determination. The current scheme allows parties that may have shipped up to 3 tons of certain wastes which directly drive remediation costs (e.g., PCE) to escape liability, while imposing significant liability upon parties such as Xerox who may have shipped marginally more waste that had little or nothing to do with the contamination or clean up.

3 – The 100% Multiplier. In light of the above, it is readily apparent that the 100% multiplier is another inappropriate vehicle for imposing excessive liability on de minimis parties. EPA policy does suggest that such a multiplier may be appropriate in the proper circumstances, where costs of remediation are somewhat uncertain, there is potential for cost overruns, etc. However, in this instance, remediation cost estimates may be off by an order of magnitude or more, as acknowledged within the report outlining the estimates.

4 – Free pass for other generators. The effect of EPA's settlement offer is to impose liability on generators of 3 to 10 tons of waste shipped to the site while allowing generators of less than 3 tons to escape liability. In a municipal waste landfill setting, such an approach makes some sense because of the likely low toxicity of waste, inconsistent and unreliable records, etc. However, in circumstances such as these, where facility records include specific waste volumes as well as identification of specific waste types from specific generators, there is no reasonable basis for choosing 3 tons as the cut-off for de minimis demands and participation. For example, a party that shipped 2 tons of PCE to the site would be given a free pass by EPA, even though that party's waste is closely related to the contamination driving the remedy at the site, while a party in Xerox's situation is left to pick up the liability and pay premiums on top of that. Where projected site costs are this substantial, it seems that any administrative burden associated with tracking down generators of 1 ton or more, for example, would be easily offset by the potential to collect at least $15,000 or $20,000 from each of those PRPs.

Conclusion - The above are some of the major shortcomings in EPA's proposed de minimis approach for this site. Obviously, there are other concerns, such as a lack of a release for natural resource damages, but I believe these have been brought to EPA's attention by other groups and parties. Xerox respectfully requests that EPA revise its de minimis offer to more fairly reflect a reasonable allocation of liability to parties such as Xerox.

Alternatively, Xerox is willing to negotiate a reasonable payment to obtain the de minimis settlement terms offered by EPA. Please contact me with EPA's response to the above. Thank you for your consideration.

Please contact me if you have additional questions.

Very truly yours,

Richard M. Lipinski
Attorney

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